No. [redacted]
192

In the

# Supreme Court of the United States

OCTOBER TERM 1963

FRANK W. CASS AND ROBERT W. STRAUSS,
*Petitioners,*

*v.*

THE YOUNGSTOWN SHEET AND TUBE COMPANY,
*Respondent.*

*Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit*


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*Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit*

Petitioner Frank W. Cass prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Fifth Circuit.

## OPINION BELOW

The opinion of the United States Court of Appeals (set out Appendix A, infra) is reported at 329 F. 2d 106.

## JURISDICTION

The judgment of the United States Court of Appeals was entered on March 20, 1964. A Petition for Rehearing was denied on May 11, 1964. The jurisdiction of the Court is invoked under 28 U.S.C. §1254 (1).

## RULE INVOLVED

*Federal Rule of Civil Procedure 60(b):*

(b) *Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc.* On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceedings was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, USC, §1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill

of review are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

## QUESTIONS PRESENTED

1. Whether petitioner is entitled to a hearing on the merits, and the use of discovery in preparation therefor, of a timely motion for relief filed in the Federal District Court pursuant to Rule 60(b) which alleges, among other matters, that respondent in the previous federal suit knowingly misrepresented the amount of an alleged indebtedness and prevented the petitioner from ascertaining the true amount due.

2. Whether a state court order authorizing the state court receiver to compromise an interpleader suit in Federal Court precludes the Federal Court from granting relief under Rule 60(b) from the Federal judgment.

## STATEMENT

Petitioner, on August 22, 1962, filed a timely Motion for Relief from Final Judgment under Rule 60(b). (R. 161-166). The judgment from which relief was sought was entered February 26, 1962. (R. 158-161). The basis of the Motion was fraud and misrepresentation. The federal district court without holding a hearing on the merits or permitting Petitioner to use the federal rules of discovery dismissed the motion without prejudice to the petitioner to seek relief from the federal judgment in state court. (R. 247). The Court of Appeals affirmed apparently on two grounds, that the motion failed to state a basis for relief and that the state court order authorizing the receiver to compromise the feder-

al interpleader suit precluded Petitioner from obtaining relief from the federal judgment.

The Rule 60(b) Petition for Relief (set out Appendix B, *infra*) among other things, alleged in reference to the federal interpleader suit that Respondent Youngstown's federal complaint asserted a debt owing of some $73,000 plus interest (R. 160-163) that Respondent immediately prior to the judgment represented to the Court and to the parties that a valid indebtedness existed to the extent of $83,000 plus (R. 163); that a note March 19, 1958, of $35,000 was fully paid and discharged (R. 163-164); that Respondent represented a claim of $30,000 plus was due and owing on such note (R. 163-164); that additional credits of $25,000 or more were not allowed by Respondent (R. 164); that Youngstown received a payment excess of $70,000 over which they were entitled (R. 164); that the Petitioner Frank W. Cass was unaware at the time of the alleged compromise and hearing in Federal Court of the false and incorrect representations by Youngstown (R. 164-165); that through the conduct of Respondent and others that the Petitioner was prevented from learning the true nature and extent of the indebtedness (R. 165).

The original judgment from which relief was sought under Rule 60(b) stemmed from a consolidation of two civil actions. On September 14, 1960, the Respondent filed suit against the Petitioner, Frank Cass, in his individual and partnership capacity. (Thunderbird Drilling Company), and the State Court receiver of the partnership, and others, seeking some $73,451.56 on various indebtednesses allegedly owed. On April 12, 1960, Phillips Petroleum Company filed an inter-

pleader action in the District of Oklahoma, Such action was transferred to the Northern District of Texas, and then consolidated with the suit filed by the Respondent. On November 21, 1961 the *state* court entered an order authorizing the state court receiver (Strauss) to settle the claim of the Respondent against the partnership. (R. 199-201) On December 22, 1961, the Federal District Court, per Judge Davidson, entered an Order disbursing the funds (approximately $85,000) which had been paid into the registry of the Court. (R. 149-150). The Petitioner, Frank W. Cass, filed a Motion for Rehearing as to the order entered on December 22, because he assertedly was not given notice and opportunity to attend the hearing. (R. 149-150). The Respondent then stated all claims asserted by them had been fully paid and compromised, requested the Court to dismiss such actions. (R. 156-157). The district court on February 5, 1962, granted the Respondent's Motion. Thereafter, the district court (per Judge Davidson) entered the judgment (R. 159-161) complained of by the instant Motion under Rule 60(b).

On August 29, 1962, in connection with the instant 60(b) Motion for Relief, the Petitioner filed pursuant to interrogatories sought information regarding payment and credits on the aforementioned notes. The Respondent refused to file any answer to the Request for Interrogatories, and accordingly the Petitioner filed a Motion for Default Judgment under Rule 37(d). (R. 177). In the alternative, the Petitioner requested the District Court under Rule 37(a) to direct the Respondent to answer the interrogatories. (R. 180-181). Thereafter, the Respondent filed a Motion to

quash the Petitioner's Rule 60(b) Motion and to strike the Interrogatories. (R. 187-196). At the hearing in open court on the foregoing Motions (R. 224-234) inquiry was made as to whether the State Court receiver of the Thunderbird Drilling Company, a co-partnership consisting of Robert B. Payne and Frank W. Cass (Petitioner), joined in Petitioner's Motion for Relief under Rule 60(b).

The Court concluded that the Receiver did not support the Rule 60(b) motion (R. 233) and entered an order on February 8, 1963, overruling the motion of the Petitioner and granting the motions of the Respondent. (R. 234-235). Immediately thereafter, on February 8, 1963, the Petitioner Cass, formally joined by the Receiver, filed a motion for new trial (rehearing). Nevertheless the district court entered an order on April 18, 1963, denying the rehearing (R. 248). The court (Judge Davidson) expressly noted that that the motion for relief under 60(b) was denied *not* because of absence of *fraud*, but because the error, if any, had been committed in *state court:*

"THE COURT:

"Gentlemen, it behooves every court to correct the errors that were committed in his court, regardless of whether the errors were traceable to the litigants, or clients or to the court itself.

"The question that suggests itself to us is, these errors were not committed in the Federal Court. All that the Federal Court did was to pay out some money that had been paid into this court, so that we never conducted a trial.

"The attorneys for the parties came up here with an agreed judgment based upon the litigation that

had taken place in the State Court, and we ordered the money disbursed in accordance with that judgment. If error has been committed by the Court in fixing the amount of money that the different parties should recover. We will dismiss the motion without prejudice to its being urged in the State Court." (R. 247).

Thus, Petitioner was completely denied the right of discovery and an opportunity to prove the merit of their Rule 60(b) motion. The Fifth Circuit affirmed.

## REASONS FOR GRANTING THE WRIT

### I The Judgment Below Raises Important Questions Regarding Federal Rule 60(b) Which Should Be Determined by this Court.

#### A. Introduction

This Court has not expressly spoken on what constitutes a basis for relief under 60(b)(3), on whether the general principles of pleading apply to Rule 60(b) motions, nor on whether the moving party is entitled to utilize the federal rules of discovery to establish fraud or misrepresentation.

The holdings of the district court and Court of Appeals by lightly brushing aside Petitioner's motion without a hearing on the merits and without permitting the use discovery emasculate Rule 60(b) from being an effective rule. Whether Rule 60(b) should be an ineffective rule to be entertained at a court's discretion or a vital rule giving parties enforceable rights is a matter that this Court should determine. Judge Wham in recent article entitled "*Federal District Court Rule*

*60(b): A Humane Rule Gone Wrong*", 49 A.B.A.J. 566 (1963) observed:

> "Among the many technical rules of civil procedure for the United States District Courts, Rule 60(b) stands alone as a bright ray of hope for parties who have had a final judgment entered against them, often without a hearing on the merits."
>
> * * *
>
> "We suggest that it may be fairly concluded that the intent in adopting Rule 60(b) was to avoid the technicalities surrounding the 'ancient' common law and equitable remedies, but that some courts have mistakenly adopted a rule of strict construction contrary to the intent of the authors of this 'humane' rule."

**B. Basis For Relief Under Rule 60(b)(3)**

The Court of Appeals' opinion states that Petitioner's motion for relief "merely asserted that he had some proof that the alleged debt was in part paid, and that Appellee knew of this when it obtained the order in the State Court for settlement of the debt." The motion stated far more (See statement, *supra* and motion which is set out Appendix B, *infra*). The motion did not allege *extrinsic* fraud, but certainly constituted a fair pleading of misrepresentation. Although this Court has not stated what elements are necessary for relief under 60(b)(3), Professor Moore in his treatise states:

> "In addition to fraud, 60(b)(3) includes 'misrepresentation, or other misconduct of an adverse party.' Because Rule 60(b) is remedial and to be construed liberally, and because of the comprehensive sweep of 60(b)(3) any fraud, misrepresentation, circumvention or

> other wrongful act of a party in obtaining a judgment so that it is inequitable for him to retain the benefit thereof, constitute grounds for relief within the intendment of 60(b)(3)." (Citing cases). *Moore's Federal Practice*, ¶60.24[5].

Particularly apropos to the issue at bar is the observation of the Second Circuit in *Market v. Swift and Co., Inc.*, 173, F. 2d 517, 518 (1949) concerning Rule 60(b)(1):

> ". . . though the case has been shunted back and forth between trial and appellate court, it has not yet progressed beyond an excise in pleading necessities. Modern impatience with procedural formalities suggests the probable improductiveness of such a cause, which we must now understand by our holding that Plaintiff cannot properly be denied opportunity to present the case they believe they have."

Under general principles of pleading the Petitioner's motion was sufficient to state a basis for relief under 60(b) as Moore interprets the Rule. With reference to pleading this Court observed in *Conley v. Gibson*, 355 U.S. 41, 47:

> ". . . the Federal Rules of Civil Procedure do not require a claimant to set out in detail the fact upon which he bases his claim. To the contrary, all the Rules require is a short and plain statement of the claims that will give the Defendant fair notice of what the Plaintiff's claim is and the grounds upon which it rests."

Even Federal Rule 9 regarding the pleading of fraud with particularity is not construed by the lower courts to require pleading of evidence where the opposing party can prepare an adequate answer. See, e.g., *United States v. Son-*

*stein*, 27 F.R.D. 285 (E.D. Pa. 1961). The Federal Rules do not expressly state that a motion under 60(b) must meet a more rigid standard than that required by Rules 8 and 9.

**C. Right of Discovery Under 60(b) Motions**

In the case at bar, Petitioner did not receive a hearing on the merits of his motion. The hearing was on whether the motion should be quashed and the interrogatories struck or whether the Court should order the Respondent to answer the interrogatories. Respondent's motions were granted, the Petitioner's denied.

Such action was *not* based upon Rule 30(b), (Orders for the Protection of Parties and Deponents), nor upon grounds that the interrogatories were beyond the scope of Rule 33. The ruling below can be sustained only if *no right of discovery exists under Rule 60(b) motions.* This question is resolved seemingly by the express provisions of the Federal Rules. Rule 1 provides:

> "*Rule 1. Scope of Rules.* These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action."

Rule 81 does *not* except proceedings filed pursuant to Rule 60(b). There is, though, no authoritative decision by this Court regarding the right of discovery under 60(b) motions.

The importance of discovery in cases of fraud and misrepresentation can *not* be over emphasized. Fraud is easy to allege, but difficult to prove. To hamstring the protesting party by denying him discovery would guarantee the defeat of his motion. Since the Supreme Court's landmark decision in *Hickman v. Taylor*, 329 U.S. 495, no informed Federal practitioner has seriously doubted the Federal views on full and fair disclosure of relevant facts by use of discovery.

> "[T]he deposit in discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case."
>
> 327 U.S. at 507.

See also, Judge Joe E. Estes' paper on discovery in the *Seminar on Procedure for Effective Judicial Administration*, 29 F.R.D. 191, 280-299 (1961).

Indeed, Federal appellate courts have upheld the sanction of default judgment for the willful failure to answer interrogatories. See, *e.g.*, *United States v. 42 Jars*, 264 F. 2d 666 (3rd Cir. 1959); *Brookdale Mill, Inc. v. Rowley*, 218 F. 2d 728 (6th Cir. 1954); *Milewski v. Schneider Transportation Co.*, 238 F. 2d 397 (6th Cir. 1956); *United States v. 3963 Bottles*, 265 F. 2d 332 (7th Cir. 1959). Petitioner contends that Rules of discovery fully apply to 60(b) motions.

**II. The judgment below in holding that relief from the federal court judgment could not be obtained because a state court order conflicts with rationale of decisions by this Court.**

The 60(b) motion sought relief from a federal judgment in a federal interpleader suit that awarded Respondent some $80,000 plus. The district court ruled:

> "The question that suggests itself to us is, these errors were not committed in the Federal Court. All that the Federal Court did was to pay out some money that had been paid into this court, so we never conducted a trial.
>
> "The attorneys for the parties came up here with an agreed judgment based upon the litigation that had taken place in the State Court, and we ordered the money disbursed in accordance with that judgment. If error has been committed by the Court in fixing the amount of money that the different parties should recover. We will dismiss the motion without prejudice to its being urged in the State Court." (R. 247).

The Court of Appeals affirmed on the basis that the Rule 60(b) motion was a "collateral attack." The state court order authorized the state court receiver to compromise the suit in federal court. The receiver possessed such power under *Texas Civil Statute, Art.* 2297. The additional effect of the state court order would be to prevent a surcharge against the receiver. The state court order was *not* a final judgment awarding property in the *custody* of the receiver to the Respondent. (compare, e.g., *Fagan and Osgood v. Boyer Ice Machine Co.*, 65 Tex. 424). Indeed, the Respondent was not even a party to the state court order. The

state order was not pled as res judicata in the federal suit and indeed could not have been so urged. The state court order was wholly immaterial to the power of the federal district court to render its judgment. Moreover, since the state court receiver formally joined the Petitioner with seeking relief under 60(b) from the federal judgment and are not concerned with federal interference in a state court receivership proceeding.

This Court has just recently considered the relationship between state and federal courts regarding the power of a state court to restrict the right to litigate in a federal forum. *Donovan et al v. Dallas* U.S. (No. 264, Oct. Term 1963), 32 U.S.L.W. 4491. From the opinions cited therein, it would seem clear: (1) that the Petitioner cannot obtain any relief from the federal interpleader suit judgment in the state court; and (2) that a state court order authorizes a receiver to compromise a claim forming the basis of a federal suit cannot preclude the federal court from giving relief under 60(b) from the federal judgment. Concurrent jurisdiction occasionally produces an intertwining of federal-state orders. In the case at bar this relationship resulted in the Respondent obtaining the money in federal court without a trial on the validity of such claim. As Judge Davidson stated: "All that the federal court did was to pay out some money that had been paid into this court, *so we never conducted a trial.* (R. 247). (Emphasis added.) Respondent now urges as a result of such state and federal court orders that the Petitioner is not entitled to relief from the federal judgment in federal court. This Court should

make it clear that state court orders do not preclude a federal court from entertaining on the merits a 60(b) motion.

## CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be granted.

Respectfully submitted,

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Dallas, Texas,
*Counsel for Petitioner,*
*Frank W. Cass.*

## CERTIFICATE OF SERVICE

This is to certify that pursuant to Supreme Court Rule 33(3) a copy of this Petition for Certiorari has been duly mailed to John L. Roach, Republic National Bank Building, Dallas, Texas, counsel for Respondent.

.....

William VanDercreek

## APPENDICES

Appendix A — The Opinion of the United States Court of Appeals. A1 - A4

Appendix B — Petitioner's Rule 60(b) Motion for Relief. B1 - B6

APPENDIX A

In the

# United States Court of Appeals

FOR THE FIFTH CIRCUIT

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No. 20592

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FRANK W. CASS AND ROBERT W. STRAUSS,
*Appellants,*

*v.*

THE YOUNGSTOWN SHEET AND TUBE COMPANY,
*Appellee.*

---

*Appeal from the United States District Court for the Northern District of Texas.*

---

(March 20, 1964.)

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Before TUTTLE, Chief Judge, and HUTCHESON and GEWIN, Circuit Judges.

HUTCHESON, Circuit Judge: Appellants assert that the district court erred in denying Cass the right to discovery under Rule 33, F.R.C.P., pursuant to his motion under Rule 60(b) F.R.C.P. to set aside a final judgment because of fraud.

Appellant Cass and Robert B. Payne, d/b/a Thunderbird Drilling Company, a partnership, became indebted to Youngstown. Cass and Payne argued, Cass sued Payne in the District Court of Dallas County, Texas, and Robert S. Strauss was appointed receiver of Thunderbird. Youngstown filed suit in the United States District Court for the Northern District of Texas against Cass, Payne, Thunderbird, Strauss and other persons asserting liens against the property which was subject to the lien of Youngstown.

An interpleader suit was filed in the United States District Court for the Northern District of Oklahoma by Phillips Petroleum Company, who produced oil from the property in question. This action was transferred to the Northern District of Texas, where Youngstown had filed its suit and was consolidated with that suit.

Phillips paid $89,624.52 into the registry of the court. A compromise was effected between Youngstown and Cass with respect to the debt alleged owing. The State court authorized Receiver Strauss to settle with Youngstown both the debt claim and the actions pending in the United States District Court for the Northern District of Texas.

At the hearing on the application of Strauss, Receiver, the United States District Court ordered the $83,242.05 which the State Court had ordered paid to Youngstown in settlement of its claim, so paid. No appeal was taken from this judgment, and six months later appellants filed a motion for rehearing to have set aside the judgment of the District Court denying the 60(b) motion on the ground of fraud.

The fraud claim contained no allegations of fact constituting fraud but merely an allegation that the debt that was compromised was not, as to a part of it, due.

Cass's Rule 60(b) motion and his companion motion under Rule 33 for discovery were both denied on the grounds that "This whole proceeding seems to go into that which is too remote and without sufficient grounds to justify a rehearing". A second motion, joined in by the receiver, was then made. This motion was in the form of a motion for new trial based on the court's denial of the Rule 60(b) and Rule 33 motions. This motion was denied on the ground that no ground for relief was stated, that if there was any error in the earlier court judgment, it was not made in the federal court but rather in the state court, that is that the judgment of the federal court was based upon an order of settlement issued by and out of the state court, and the errors, if any, occurred not in the federal court but in the state court, and the motion under Rule 60(b) was in effect a collateral attack upon a state court order.

We think it clear that the motions were properly denied and that appellants are entitled to no relief from the order denying them. Appellant Cass merely asserted that he had some proof that the alleged debt was in part paid, and that appellee knew of this when it obtained the order in the state court for settlement of the debt. This is not an allegation of fraud in obtaining the federal court judgment, particularly since the al-

leged debt was in part paid, appellee knew of this when the debt was settled, and the alleged debt was greatly in excess of the amount of the settlement.

The relief from the orders appealed from is DENIED, and the orders are AFFIRMED.

## APPENDIX B

## MOTION FOR RELIEF FROM FINAL JUDGMENT UNDER RULE 60 (b)

(Numbers and Title Omitted) (Filed August 22, 1962)

Comes now the Defendant Frank W. Cass for relief pursuant to Federal Rule of Civil Procedure 60(b) and states:

I.

This Honorable Court by Order entered December 22, 1961, directed among other things, that Youngstown Sheet and Tube Company be paid from monies deposited in Court by Phillips Petroleum Company the sum of $78,809.73 and the sum of $4,432,32, which total of $83,242.05 was to be in full payment of the claims of Youngstown Sheet and Tube Company against the Thunderbird Drilling Company, a co-partnership of the Defendant Frank W. Cass and Robert B. Payne; the Order is attached as Exhibit A and made a part of this motion.

II.

This Honorable Court by its Judgment entered February 26, 1962 affirmed its Order of December 22, 1961 that the payment of $83,242.05 would be in full settlement and discharge of the claims by Youngstown Sheet and Tube Company. The Judgment of the Court is final and attached as Exhibit B and made a part of this motion.

III.

Youngstown Sheet and Tube Company by its original complaint filed in this Court, Civil Action No. 8581, alleged that one Robert B. Payne, individually and in behalf of the co-partnership firm of Thunderbird Drilling Company had executed four notes to wit:

(a) Notes dated April 31, 1957, in principal sum of $90,000.00;

(b) Note dated May 31, 1957, in principal sum of $47,995.87;

(c) Note dated September 30, 1957, in the principal sum of $16,770.00;

(d) Note dated March 19, 1958, in the principal sum of $33,936.05,

which notes were attached on Exhibits A through D to Youngstown's complaint. It was also alleged that the co-partnership Thunderbird Drilling Company was indebted to Youngstown on an open account for the sum of $3,229.32. Youngstown further alleged that there was due and owing at the time of filing its complaint:

(1) $19,158.00 principal on the note dated May 31, 1957;

(2) $16,770.00 principal on the note dated September 30, 1957;

(3) $30,149.39 principal on the note dated March 19, 1958;

(4) $4,144.00 accrued interest to September 1, 1960 on the note dated May 19, 1958;

(5) $3,229.32 on the open account;

and that the total amount then due and owing was $73,451.56.

IV.

Youngstown Sheet and Tube Company filed a petition for intervention on April 8, 1960, in the 160th District Court of the State of Texas in which it alleged the total amount then due and owing was $70,708.25.

V.

Youngstown Sheet and Tube Company further represented to this Honorable Court and to the parties to such proceedings that a valid indebtedness existed between itself and the co-partnership Thunderbird Drilling Company in the amount of $83,242.05 as of December 22, 1960; and the Youngstown Sheet and Tube Company thereby received by Order of this Honorable Court the sum of $83,242.05 in payment in full of its claims.

VI.

On the date of this Honorable Court's Order and also on the date of this Court's Judgment a valid indebtedness of $83,242.05 did not exist between Youngstown Sheet and Tube Company and the co-partnership of Thunderbird Drilling Company. The note dated March 19, 1958, in its principal sum of $35,936.05 which Youngstown alleged $30,149.39 principal was due and owing, was fully paid and discharged and a full release had been given by Continental Emsco Company, a division of Youngstown Sheet and Tube Company. Other payments to Continental-Emsco and or Youngstown Sheet and Tube Company by or in behalf of Thunderbird

Drilling Company were not credited against the alleged indebtedness. In addition various property of fair value of approximately $25,000.00 or more belonging to Thunderbird Drilling Company was wrongfully converted and sold by Continental-Emsco Company (Youngstown) for which no proper credit was made on the alleged indebtedness to Youngstown Sheet and Tube Company.

VII.

As a result of the foregoing facts set forth in Paragraph VI above, Youngstown Sheet and Tube Company received an overpayment in excess of $70,000.00. Youngstown Sheet and Tube Company knew that it was not entitled to receive this sum of $83,242.05 from the registry of this Honorable Court but received such amount through fraud as herein set out.

VIII.

As stated in this Honorable Court's Judgment Order (Exhibit B), there is now pending in the 160th District Court of the State of Texas a receivership action to Defendant Frank W. Cass, the Thunderbird Drilling Company and others. By Order of such State District Court all discovery has been frozen and the Defendant, Frank W. Cass was unaware of the fraud in procuring the Judgment in this Honorable Court at the time such Judgment was entered or within the time to file a motion for new trial. The Defendant Frank W. Cass, individually, and through his attorneys, has requested from Continental-Emsco and also from

Robert S. Strauss, Receiver appointed by the State Court and Defendant herein, full and complete accounts of the sum owed and paid Continental Emsco but has not been furnished with same.

IX.

Through the conduct of Continental-Emsco (Youngstown Sheet and Tube Company) and Robert B. Payne, the Defendant Frank W. Cass was and is prevented from learning the true nature and extent of the indebtedness by Thunderbird Drilling Company to Youngstown Sheet and Tube Company. The Defendant Robert B. Payne has in his custody and control certain books, records and accounts which are relevant to the activities of Thunderbird Drilling Company but has and still refuses to permit the Defendant Frank W. Cass to examine such books and records.

X.

The Judgment of this Honorable Court if not vacated and modified prevents other creditors of the Thunderbird Drilling Company co-partnership from receiving their share, if any, of the proceeds made into the registry of this Court; and also prevents any recovery on behalf of the Thunderbird Drilling Company from Youngstown Sheet and Tube Company even though a substantial overpayment be proved.

WHEREFORE, Defendant Frank W. Cass prays the Judgment of this Honorable Court of February 23, 1962 in the instant cause be vacated and set aside and that the Youngstown Sheet and Tube Company be directed and

required to return all monies over which it was not entitled together with interest thereupon and that Defendant Frank W. Cass have such further relief that is equitable and just.

Respectfully submitted,

WOODGATE & RICHARDS

By: S/ William L. Richards
William L. Richards
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[Note: Exhibits A and B to Motion, R. 166-171, omitted]